

Message

From: Makepeace, Caroline [Makepeace.Caroline@epa.gov]
Sent: 1/13/2021 7:55:31 PM
To: Koslow, Karin [Koslow.Karin@epa.gov]
CC: Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]; Porter, Amy [Porter.Amy@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: Re: DOJ Mitigation memo

Thanks! They do have a tendency to just go on ahead and do as they wish...

Sent from my iPhone

On Jan 13, 2021, at 2:10 PM, Koslow, Karin <Koslow.Karin@epa.gov> wrote:

Thanks, Caroline – I wasn't aware. I'll forward to the IO for awareness as well.

Thanks,
Karin

Karin Koslow
Deputy Director, Office of Civil Enforcement
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From: Makepeace, Caroline <Makepeace.Caroline@epa.gov>
Sent: Wednesday, January 13, 2021 1:14 PM
To: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: FW: DOJ Mitigation memo

See Bloomberg article below – DOJ issued the Clark mitigation memo. Not sure if anyone was aware this was being issued, and it's been a while since we saw the draft.

It appears that they did take certain comments: somewhat revising a misleading pollutant to pollutant example at the end of I.b. on page 6; and stating the draft was shared with EPA prior to issuance versus "developed in consultation with EPA."

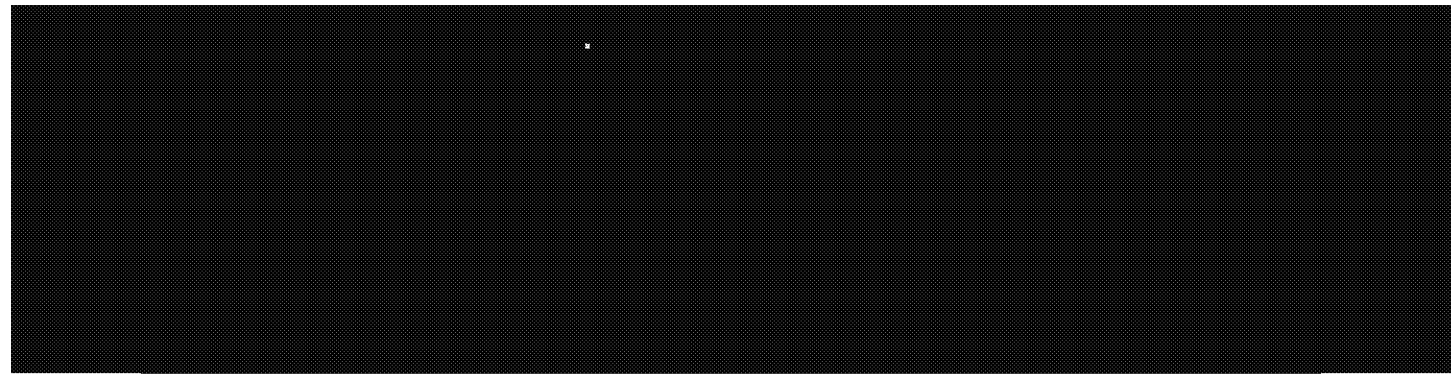
But they did not remove all the unnecessary discussion of SEPs and the MRA, nor revise the statements that were not accurately supported by the cases to which they cited.

However, as we noted before, the general principles/directions are fairly consistent with current practice.

Caroline Makepeace
Senior Counsel
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From: Bloomberg Law <bloomberg@bna.com>
Sent: Wednesday, January 13, 2021 12:48 PM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>
Subject: Exclusive:



Environment & Energy Report

Wednesday, January 13, 2021

Justice Department Memo Targets Mitigation in Environment Cases

The Trump administration is limiting the inclusion of certain mitigation requirements in environmental enforcement cases, building on other Justice Department moves to set constraints on settlements.

Assistant Attorney General Jeffrey Bossert Clark issued a [memo](#) Tuesday, requiring lawyers in the Environment and Natural Resources Division to include “equitable

mitigation” relief in settlements only after considering a set of precautions “to ensure that our civil enforcement actions do not overstep the bounds set by Congress.”

Equitable mitigation refers to Justice Department lawyers’ practice of asking courts to force companies to remedy alleged violations by offsetting related environmental harms. It’s a form of relief often included in environmental settlements.

Clark’s policy is cause for “significant concern,” said Lois Schiffer, who led ENRD during the Clinton administration. “But this is all going to be revisited when he leaves, which is imminent.”

The incoming Biden administration is expected to review this and other Clark policies as soon as new political officials are installed. The president-elect hasn’t yet announced a nominee to lead ENRD.

‘Not a Blank Check’

Clark’s memo acknowledges courts’ power to order equitable relief, but says it’s “not a blank check.”

He cautioned attorneys in the environment division to weigh certain factors when considering such relief: that there’s a strong legal basis for mitigation; that there’s a geographic connection between a mitigation project and harm caused by a violation; that a project’s costs don’t outweigh its benefits; and that monetary penalties are still the first and primary form of relief sought.

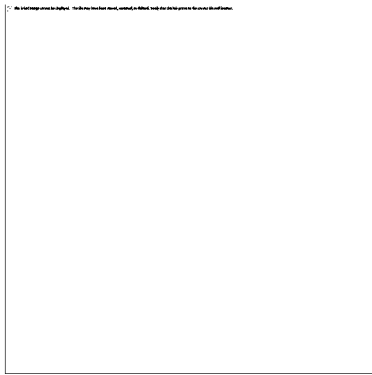
The directive builds upon Clark’s 2018 memo barring the use of “supplemental environmental projects” in settlements. SEPs, unlike mitigation, are voluntary efforts alleged violators can take to benefit the environment—sometimes in exchange for lower fines. But the projects often don’t have as close a connection to the alleged violations as equitable mitigation relief.

“The exact line between permissible mitigation relief and illegal SEPs can be difficult to trace,” Clark wrote.

Sidley Austin LLP lawyer David Buente said this week’s memo “is kind of like the other shoe falling.”

“The memo, if it’s implemented, will undoubtedly lead to it being used in fewer cases,” he said of equitable mitigation. “It will lead to a narrowing of it, but it’s not prohibiting it altogether.”

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